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DCM, INC., and ALIRAZA JIVAN and  
Specially appearing on behalf of Defendants  
LIBERTY NOVELTY, INC., and  
ALFIA JIVAN

**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF CALIFORNIA – BAKERSFIELD DIVISION**

FULL SPECTRUM IH, LLC, a Florida  
limited liability company,

Plaintiff,

v.

DCM, INC., a Nevada corporation;  
LIBERTY NOVELTY, INC., a  
Maryland corporation; ALIRAZA  
JIVAN, an individual; ALFIA JIVAN,  
an individual; and DOES 1 through 10,  
inclusive,

Defendants.

CASE NO. 1:20-cv-00673-DAD-JLT

**DEFENDANTS DCM, INC., AND  
ALIRAZA JIVAN AND  
SPECIALLY APPEARING  
DEFENDANTS LIBERTY  
NOVELTY, INC., AND ALFIA  
JIVAN'S NOTICE OF MOTION  
AND MOTION TO SET ASIDE  
ENTRY OF DEFAULT;  
MEMORANDUM OF POINTS  
AND AUTHORITIES  
(FRCP 55(c))**

[Filed concurrently with the  
Declarations of Alfia Jivan, AliRaza  
Jivan, Minor "AJ," Alejandra Duran,  
Reza I. Gharakhani, Esq., and  
Proposed Order]

Date: September 10, 2020; 9:30 a.m.  
Judge: Hon. Jennifer L. Thurston  
Place: United States Courthouse,  
510 19<sup>th</sup> Street, Ste. 200  
Bakersfield, CA 93301

**TO THE COURT, ALLPARTIES, AND THEIR COUNSEL OF  
RECORD:**

PLEASE TAKE NOTICE that on Tuesday, September 10, 2020, at 9:30

1 a.m., or as soon thereafter as the matter may be heard before the Honorable Judge  
2 Jennifer L. Thurston in the United States District Court for the Eastern District of  
3 California, Suite 200 of the United States Courthouse, located at 510 19<sup>th</sup> Street,  
4 Bakersfield, California 93301, Defendants Alfia Jivan and Liberty Novelty, Inc.,  
5 special and limited appearance, and Defendants AliRaza Jivan and DCM, Inc., will  
6 and hereby move the court to set aside the Defaults entered by the Clerk on June 17,  
7 2020 and July 21, 2020 in this matter pursuant to Rule 55(c) of the Federal Rules of  
8 Civil Procedure.

9 This motion is made on the grounds that: (1) the entry of default was due to  
10 improper service of process that was not communicated to Defendants and  
11 Defendants' inadvertence that caused the delay in filing an Answer to Plaintiff's  
12 Complaint; (2) setting the entry of default aside will not prejudice Plaintiff as the  
13 case was only recently filed and no other parties aside from Plaintiff and  
14 Defendants are involved; and (3) Defendants have meritorious defenses to the  
15 claims for relief alleged in Plaintiff's Complaint.

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1 This Motion is based on this Notice of Motion and Motion, the  
2 accompanying Memorandum of Points and Authorities, the Declarations of Alfia  
3 Jivan, AliRaza Jivan, their minor son identified by his initials “AJ,” Alejandra  
4 Duran and Reza I. Gharakhani, Esq., and exhibits attached thereto, and upon such  
5 other matters as may be presented to the Court at the time of the hearing.

6  
7 Dated: August 13, 2020

ROSTOW & AUSTER LLP

8  
9 By: /s/ Reza I. Gharakhani

10 REZA I. GHARAKHANI  
11 Attorneys for Defendants  
12 DCM, INC., and ALIRAZA JIVAN and  
13 Specially appearing on behalf of  
14 Defendants LIBERTY NOVELTY, INC.,  
15 and ALFIA JIVAN  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Defendants Alfia Jivan (“Alfia Jivan”) and Liberty Novelty, Inc., (“Liberty” [Alfia Jivan and Liberty will hereinafter be referred to as “Special Defendants<sup>1</sup>”]) by this special (i.e., limited) appearance and motion under Federal Rule of Civil Procedure 55(c), hereby request that the Court set aside the clerk’s entry of default entered against Alfia Jivan and Liberty on June 17, 2020.

Defendants AliRaza Jivan (“AliRaza Jivan”) and DCM, Inc., (“DCM” [Alfia Jivan, Liberty, AliRaza Jivan and DCM will hereinafter be collectively referred to as “Defendants”]) by this motion under Federal Rule of Civil Procedure 55(c) hereby request that the Court set aside the clerk’s entry of default entered against DCM on July 21, 2020, and the entry of default entered against AliRaza Jivan on July 21, 2020.

Absent setting aside the Clerk’s Defaults, Defendants are exposed to potentially significant financial loss well over \$475,197.80, excluding attorneys’ fees and costs. (ECF No. 15.)

**II. PROCEDURAL BACKGROUND**

On May 12, 2020, Plaintiff filed this action. The Complaint asserts four claims: (1) Promissory Fraud, (2) Breach of Written Contract, (3) Breach of Implied Covenant of Good Faith and Fair Dealing, and (4) Violation of Business and Professions Code Section 17200. (ECF No. 1.)

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<sup>1</sup> For the avoidance of doubt, Special Defendants’ limited (i.e., special) appearance at this time is limited to challenging the Clerk’s entry of default. Special Defendants’ special appearance for this purpose is not intended to waive any rights or protections available to Special Defendants, including the right to raise defenses and arguments by motion or in responsive pleadings. *See Twin Rivers Eng’g, Inc. v. Fieldpiece Instruments, Inc.*, No. CV16-04502-BRO(MRWx), 2016 WL 7479373, at \*4-5 (C.D. Cal. Sept. 8, 2016) (finding defendant had not waived its right later to bring a Rule 12(b)(5) motion because “in its Motion to Set Aside Default Defendant CHY explicitly stated that it intended to assert the defense of insufficient service of process”). Once the Court vacates the entry of default, Special Defendants intend promptly to move for dismissal under Federal Rules of Civil Procedure 12(b)(2), 12(b)(5), and 12(b)(6). As such, this Motion is brought without prejudice to those rights.

1 Among other allegations, the Complaint avers that Alfia Jivan is “an  
 2 individual residing in Washington County, Maryland, and doing business in Kern  
 3 County, California,” (Complaint ¶10) and that Liberty is “a Maryland corporation  
 4 with its principal place of business in Washington County, Maryland, and doing  
 5 business in Kern County, California (*Id.* ¶8). In-fact, Alfia Jivan is a resident of  
 6 Maryland and has never resided, worked or conducted business in the State of  
 7 California. (Complaint ¶ 10; Alfia Decl. ¶ 3.) Liberty is a Maryland corporation and  
 8 has not conducted any business in the State of California. (Complaint ¶8; Alfia  
 9 Decl. ¶ 4.) The Special Defendants expressly reserve their rights to move for  
 10 dismissal under Federal Rules of Civil Procedure 12(b)(2), 12(b)(5), and 12(b)(6).

11 On June 16, 2020, Plaintiff filed a Request for Entry of Default of  
 12 Defendants Alfia Jivan, DCM and Liberty. (ECF Nos. 8, 9, 10.) On July 21, 2020,  
 13 Plaintiff filed a Request for Entry of Default of Defendant AliRaza Jivan. (ECF No.  
 14 12.)

15 The accompanying declaration by Plaintiff’s counsel, Benson L. Lau, Esq.,  
 16 indicates that Alfia Jivan was served by personal service on May 20, 2020 (ECF  
 17 No. 8 ¶ 2) and that she was served, contemporaneously, as agent of DCM pursuant  
 18 to California Code of Civil Procedure section 416.10(a). (ECF No. 9 ¶ 2, Ex. A.)  
 19 The Lau Declaration also states that AliRaza Jivan was served by substituted  
 20 service upon Alfia Jivan on May 20, 2020. Plaintiff, however, apparently waited  
 21 until June 16, 2020 to mail a copy of the summons and complaint in satisfaction of  
 22 California Code of Civil Procedure 415.20(a)(b) (ECF No. 12 ¶¶ 2, 3.) Liberty was  
 23 served pursuant to California Code of Civil Procedure section 416.10(a) by service  
 24 upon its registered agent in Nevada (ECF No. 10 ¶ 2, Ex. A.)

25 On June 17, 2020, the Clerk entered the defaults of Defendants Alfia Jivan,  
 26 DCM and Liberty Novelty (ECF No. 11). Thereafter, on July 21, 2020, the Clerk  
 27 entered the default of Defendant AliRaza Jivan (ECF No. 13).

28 On July 22, 2020, the Court ordered that Plaintiff shall “file a motion(s) for

1 default judgment” by August 31, 2020. (ECF No. 14.)

2 On August 3, 2020, Plaintiff filed its Motion for Entry of Clerk’s Default  
3 Judgment against DCM. (ECF No. 15.)

### 4 **III. STATEMENT OF FACTS**

#### 5 **A. Background**

6 Liberty is a manufacture and distributor of supplements and tobacco  
7 accessories. DCM is in the business of purchasing Hemp for resale. Alfia Jivan is  
8 the President of both Liberty and DCM and handles the financial operations of  
9 Liberty in Maryland. AliRaza Jivan is Alfia Jivan’s husband, the Chief Executive  
10 Officer of Liberty and DCM and is responsible for the day-to-day operations of  
11 both Liberty and DCM. (Alfia Jivan Decl. ¶¶ 5, 6, 7.) (AliRaza Jivan Decl. ¶¶ 3, 4,  
12 5.)

13 Pre-Covid-19, Liberty employed approximately 41 employees and DCM  
14 employed approximately 26 employees. When Maryland and Nevada’s shutdown  
15 orders went into effect, Liberty and DCM were forced to reduce their workforce  
16 and requested that certain of their non-essential employees work from home. As  
17 such, the employees who regularly received, sorted and scanned Liberty and  
18 DCM’s notices and mail were no longer working at Liberty and DCM’s offices and  
19 thus unable to perform their tasks. Accordingly, all of the notices and mail that  
20 were received by Alfia Jivan and Liberty were placed in AliRaza Jivan’s home  
21 office for his review and response upon his return from Nevada. Notices and mail  
22 to DCM were left unopened until one of its employees had the time to open, sort,  
23 scan and forward the mail to AliRaza Jivan for his review and response. This was  
24 Defendants’ custom and practice after the Covid-19 shut down orders went into  
25 affect as Liberty and DCM simply did not have the staff to open, scan and forward  
26 all incoming mail to AliRaza Jivan on a regular schedule. Liberty and DCM were  
27 simply trying to make sure they survived and were able to meet their payroll  
28 obligations. (Alfia Jivan Decl. ¶ 8.) (AliRaza Jivan Decl. ¶ 6.)

## B. Plaintiff's Defective Service of Process

Despite the representations in the Lau Declaration, Alfia Jivan was not served individually or on behalf of Liberty or AliRaza Jivan. Plaintiff's process server served Alfia Jivan and AliRaza Jivan's son who is a 15-year-old minor. (Alfia Jivan Decl. ¶¶ 9, 10, 11.) (AJ Decl. ¶¶ 2, 3, 4.)<sup>2</sup> (Alejandra Duran Decl. ¶¶ 3, 4, 5, 6.) AJ, not knowing the importance of the documents, placed the documents alongside the other documents in his father's home office for his father's review upon AliRaza Jivan's return to Maryland from Las Vegas, Nevada. (Alfia Jivan Decl. ¶ 12.) (AJ Decl. ¶¶ 2, 3, 4.)

When Alfia Jivan returned home from work later that evening, AJ informed his mother that a man had come to the front door and hand delivered documents to him. AJ showed his mom where he had placed the documents in his father's home office. (Alfia Jivan Decl. ¶ 12.) Not knowing the importance of the documents, Alfia Jivan did not review the documents, take any action on them or forward them to AliRaza Jivan for review and/or a response. (Alfia Jivan Decl. ¶ 13.) (AliRaza Jivan Decl. ¶¶ 7, 14.) Alfia Jivan not having been a party in any lawsuit before did not know the importance of the summons and complaint nor was she aware that she and Defendants had to respond to the Complaint within a certain amount of time. Alfia Jivan simply believed that these documents were additional demand letters from Plaintiff. (Alfia Jivan Decl. ¶¶ 12, 13.)

Adding to Defendants' confusion was that prior to the instigation of this lawsuit, Plaintiff had mailed at least four copies of its demand letter, that included a copy of Plaintiff's proposed complaint, to Defendants at both Alfia Jivan and AliRaza Jivan's residence in Maryland, Liberty and DCM's registered agent. Upon receiving Plaintiff's demand letters, Alfia Jivan, as was her custom and practice,

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<sup>2</sup> In compliance with Fed. R. Civ. P. 5.2 and Local Rule 140, Alfia Jivan and AliRaza Jivan's minor son will only be identified only by his initials "AJ" in order to protect his identity. If necessary, AJ can testify at the hearing on Defendants' Motion.



1 placed the document in AliRaza Jivan's home office awaiting his review upon his  
2 return home from Nevada. (Alfia Jivan Decl. ¶ 13.)

3 AJ had taken the documents he was handed on May 20, 2020 and placed  
4 them in the same stack of documents in AliRaza Jivan's home office as those  
5 containing the demand letters that Alfia Jivan had received. (AJ Decl. ¶¶ 2, 3.)

6 Unfortunately, although a copy of Plaintiff's pre-litigation demand letter was  
7 unknowingly received by DCM's registered agent, the electronic mail ("email")  
8 from DCM's registered agent giving notice to AliRaza Jivan was apparently  
9 inadvertently directed to AliRaza Jivan's "spam" mailbox by his email program's  
10 "spam-filtering" software as AliRaza Jivan never received this notice. The same is  
11 true of the notice of service of process of the Complaint from DCM's registered  
12 agent. The registered agent's email notice was also apparently misdirected to  
13 AliRaza Jivan's "spam" mailbox by his "spam-filtering" software. As DCM's  
14 registered agent was hired within the 2019 year, apparently AliRaza Jivan's "spam-  
15 filtering" software misdirected emails from DCM's registered agent to AliRaza  
16 Jivan's "spam" mailbox. (AliRaza Jivan Decl. ¶¶ 8, 9.)

17 Further, given the reduction of employees working for DCM and Liberty  
18 post-Covid-19, the employees that would have potentially rechecked AliRaza  
19 Jivan's spam folder were not working and thus not able to detect the notices from  
20 DCM's registered agent. (AliRaza Jivan Decl. ¶ 8.)

21 It should be noted that although Plaintiff was in communication with AliRaza  
22 Jivan, Plaintiff never informed Defendants, and specifically AliRaza Jivan, that  
23 Plaintiff has filed this lawsuit.

24 **C. Plaintiff's Counsel Registered Defendant AliRaza Jivan with**  
25 **This Court's CM/ECF**

26 As it turns out, Plaintiff's counsel, Benson K. Lau, Esq., registered AliRaza  
27 Jivan's email with this Court's CM/ECF service without AliRaza Jivan's  
28 knowledge. (Gharakhani Decl. ¶ 11.) (AliRaza Jivan Decl. ¶ 10.) Plaintiff's



1 counsel, however, had not notified AliRaza Jivan that he should expect to receive  
 2 legal notices from the court's ECM service or that Plaintiff had instigated this  
 3 lawsuit. (*Id.* ¶ 10.)

4 Given the lack of notice, the first time Defendants became aware of the  
 5 pendency of this lawsuit was when AliRaza Jivan was filtering through his spam  
 6 mailbox on Sunday, July 26, 2020, and saw this Court's CM/ECF message  
 7 informing him of the Clerk's July 21, 2020 Entry of Default (ECF No. 13). (Alfia  
 8 Jivan Decl. ¶ 14.) (AliRaza Jivan Decl. ¶¶ 11, 13.) As Defendants were not  
 9 represented by counsel at the time of service, that very same day, AliRaza Jivan  
 10 started the process for searching for legal counsel to represent him, his wife and  
 11 their two companies. By July 29, 2020, three days later, AliRaza Jivan had retained  
 12 counsel for all Defendants. (AliRaza Jivan Decl. ¶¶ 12, 13.)

#### 13 **D. Defendants Acted Diligently Upon Learning of This** 14 **Litigation**

15 As explained above, Plaintiff's methods to "serve" Defendants with the filing  
 16 of this litigation included (1) service on Alfia Jivan and AliRaza Jivan's 15-year-  
 17 old son, and (2) serving the Liberty's agent for service of process. (Alfia Jivan  
 18 Decl. ¶ 12.) (AJ Decl. ¶ 2.) Unfortunately, as described above, Defendants did not  
 19 receive notice of this litigation through either of these methods. (Alfia Jivan Decl.  
 20 ¶¶ 11, 13, 14.) (AliRaza Jivan Decl. ¶¶ 7, 14.)

21 On July 29, 2020, at 9:19 a.m., three days after discovering that his default  
 22 had been entered, Defendants' counsel wrote a letter to Plaintiff's counsel and  
 23 requested that Plaintiff stipulate to set aside Defendants' defaults. Plaintiff's  
 24 counsel did not respond. (Gharakhani Decl. ¶¶ 2, 7.)

25 Not having received a response to Defendants' July 29, 2020 letter,  
 26 Defendants' counsel called Plaintiff's counsel on Monday, August 3, 2020, hoping  
 27 to speak with him. Unable to reach Plaintiff's counsel directly, Defendants' counsel  
 28 left Plaintiff's counsel a voice-mail message at approximately 4:50 p.m.

1 Approximately 20 minutes later, Plaintiff's counsel wrote to Defendants' counsel  
2 informing him that Plaintiff would not stipulate to set aside Defendants' defaults  
3 and enclosed a copy of Plaintiff's Motion for Entry of Clerk's Default Judgment  
4 against DCM that Plaintiff had filed that very day. (Gharakhani Decl. ¶¶ 8, 9.)

5 Plaintiff waited until after it had prepared and filed its Motion for Entry of  
6 Clerk's Default Judgment to notify Defendants that Plaintiff would not stipulate to  
7 set aside Defendants' defaults. (Gharakhani Decl. ¶ 9.)

8 **E. Defendants Tried Repeatedly to Resolve This Matter**  
9 **Without This Court's Intervention**

10 As stated above, on July 29, 2020, counsel for Defendants wrote his first  
11 letter to Plaintiff's counsel asking if Plaintiff would stipulate to set aside the entry  
12 default against Defendants. (Gharakhani Dec. ¶ 7, Ex. 1.) Thereafter, on August 4,  
13 2020, Defendants' counsel again wrote to Plaintiff's counsel seeking to meet and  
14 confer on the issues. (Gharakhani Dec. ¶ 10, Ex. 2.) In a subsequent telephone  
15 discussion that same day, Plaintiff's counsel refused to stipulate to set aside  
16 Defendants' defaults. (Gharakhani Dec. ¶ 10.)

17 Not giving up, Defendants continued their meet and confer efforts and the  
18 parties exchanged lengthy emails on the subject as recently as August 11, 2020.  
19 Unfortunately, Defendants' efforts to resolve this issue informally proved to be of  
20 no avail and thus Defendants had no other option but to file this instant Motion on  
21 August 12, 2020. (Gharakhani Dec. ¶ 12, Ex. 3.)

22 **IV. LEGAL STANDARD**

23 Rule 55(c) of the Federal Rules of Civil Procedure authorizes courts to "set  
24 aside an entry of default for good cause[.]" Fed R. Civ. P. 55(c). To determine good  
25 cause, a court considers "three factors: (1) whether [the party seeking to set aside  
26 the default] engaged in culpable conduct that led to the default; (2) whether [it] had  
27 [no] meritorious defense; or (3) whether reopening the default judgment would

prejudice’ the other party.”<sup>3</sup> *United States v. Signed Pers. Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1091 (9th Cir. 2010) (citation omitted). “[H]owever, ‘judgment by default is a drastic step appropriate only in extreme circumstances; a case should, whenever possible, be decided on the merits.’” *Id.* The Ninth Circuit’s “rules for determining when a default should be set aside are solicitous towards movants, especially those whose actions leading to the default were taken without the benefit of legal representation.” *Id.* at 1089. Absent “extreme circumstances,” judgment by default is inappropriate. *Id.* at 1091-92.

## V. ARGUMENT

Each of the relevant factors weighs in favor of this Court setting aside the entry of defaults: The defaults were not willful. Defendants have meritorious defenses. Finally, setting aside the entry of default will not cause Plaintiff *any* prejudice.

### A. Defendants’ Default Was Not Willful or Culpable

“[A] defendant’s conduct is culpable if he has received actual or constructive notice of the filing of the action and intentionally failed to answer.” *Mesle*, 615 F.3d at 1092. Here, Plaintiff’s service upon the Jivan’s minor son coupled with Alfia Jivan’s confusion in believing the documents were simply additional demand letters and her inexperience with legal proceedings, lead to Defendants’ failure to timely appear in this action. (Alfia Jivan Decl. ¶¶ 9, 10, 12, 13, 14.) Additionally, as detailed above, service on DCM’s registered agent also failed to provide Defendants with notice. (AliRaza Jivan Decl. ¶ 8, 14.)

Understandably, Defendants did not learn of this lawsuit from either of these methods. Indeed, AliRaza Jivan did not learn of the lawsuit until July 26, 2020, after the June 17, 2020 and July 21, 2020 entry of defaults. Thus, Defendants’

<sup>3</sup> “[T]he same test applies for motions seeking relief from default judgment under both Rule 55(c) and Rule 60(b), [but] the test is more liberally applied in the Rule 55(c) context” because “there is no interest in the finality of the judgment” when merely lifting the entry of default, as here. *Mesle*, 615 F.3d at 1091 n.1.

1 failure to respond to the complaint prior to the entry of default “was for an  
 2 understandable reason and does not appear to have been for an improper purpose or  
 3 to gain an advantage in the litigation[.]” *Twin Rivers Eng’g, Inc. v. Fieldpiece*  
 4 *Instruments, Inc.*, No. CV-16-04502 BRO(MRWx), 2016 WL 7479368, at \*3 (C.D.  
 5 Cal. Aug. 10, 2016).

6 Defendants’ conduct in failing to answer the Complaint was not culpable  
 7 within the meaning of Rule 55(c). “Culpable” conduct for purposes of Rule 55(c) is  
 8 conduct motivated by bad faith for the purpose of gaining some advantage in the  
 9 litigation, such as by avoiding liability by staying out of court or by actively  
 10 avoiding service to thwart the lawsuit. *Mesle*, 615 F.3d at 1093-94. Here,  
 11 Defendants had nothing to gain by failing to respond to Plaintiff’s Complaint  
 12 except what they received: an entry of default and, potentially, default judgment  
 13 against DCM. Defendants had every reason to respond to the Complaint in order to  
 14 avoid having their defaults taken and, thereafter, hoping that their defaults would be  
 15 set aside. There could have been no “intention to take advantage of the opposing  
 16 party, interfere with judicial decision making, or otherwise manipulate the legal  
 17 process.” *Id.* at 1092.

18 Further, Defendants’ conduct was not “devious, deliberate, willful, [or in]  
 19 bad faith” (*Id.*); the worst that can be said of Defendants’ conduct is that it was  
 20 careless and negligent. This is not a case involving intentional, strategic obstruction  
 21 of the legal process; this is a case of a improper service, misunderstanding of the  
 22 significance of documents (Alfia Jivan Decl., ¶¶ 9, 10, 12,13, 14) and missed  
 23 emails (AliRaza Jivan Decl., ¶¶ 7, 8, 14). Such ordinary carelessness, while not  
 24 praiseworthy, is not “culpable” within the meaning of Rule 55(c). *Mesle*, 615 F.3d  
 25 at 1092-93. (“[I]t is clear that simple carelessness is not sufficient to treat a  
 26 negligent failure to reply as inexcusable, at least without a demonstration that other  
 27 equitable factors, such as prejudice, weigh heavily in favor of denial of the motion  
 28 to set aside a default.”); see also *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1225

1 (9th Cir. 2000) (default should be set aside where “[defendant’s] errors resulted  
 2 from negligence and carelessness, not from deviousness or willfulness”). Therefore,  
 3 this factor weighs in favor of setting aside the entry of default.

4 Defaults are generally disfavored and the Ninth Circuit has narrowly defined  
 5 conduct that will qualify as culpable. In *TCI Group Life Ins. Plan v. Knoebber*, 244  
 6 F.3d 691, 696 (9<sup>th</sup> Cir. 2001), the Ninth Circuit relied heavily on the Supreme  
 7 Court’s broad definition of excusable neglect in *Pioneer Inv. Servs. Co. v.*  
 8 *Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993) to find that conduct is not  
 9 culpable even where a defendant had received a pleading, read and understood it,  
 10 and took no steps to meet the deadline for filing a responsive pleading, *Id.* at 697.  
 11 The court explained that to amount to being culpable, a defendant’s conduct must  
 12 be “ ‘willful, deliberate, or eviden[t] of bad faith.’ ” *Id.* (quoting *American Alliance*  
 13 *Inc. Co. v. Eagle Ins. Co.*, 92 F.3d 57, 61 (2d Cir. 1996)).

14 “Neglectful failure to answer as to which the defendant offers a credible,  
 15 good faith explanation negating any intention to take advantage of the opposing  
 16 party, interfere with judicial decision making, or otherwise manipulate the legal  
 17 process is not intentional under our default cases, and is therefore not culpable or  
 18 inexcusable.” *TCI Group*, *supra*, 244 F.3d at 698. Defendants’ conduct was not  
 19 culpable under this standard because they did not intend to delay or interfere with  
 20 this action in bad-faith, nor did they attempt a tactical advantage over Plaintiff.

21 Whether Alfia Jivan, AliRaza Jivan and Liberty are ultimately correct or  
 22 incorrect with respect to the adequacy of Plaintiff’s attempted service upon them is  
 23 not the relevant question on this Motion. That issue can properly be determined  
 24 after default is lifted, when Defendants move to dismiss for failure to effect service  
 25 (and for lack of personal jurisdiction). Instead, the only question is whether  
 26 Defendants received actual notice of the litigation through the attempted service; it  
 27 is undisputed that they did not, and therefore they could not possibly have  
 28 responded prior to the entry of default. “[A] party’s failure to file on time for

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1 reasons beyond his or her control is not considered to constitute ‘neglect.’”  
 2 *McCarran v. Fed. Ins. Co.*, No. SACV 07-685-AG(RNBx), 2007 WL 9662398, at  
 3 \*2 (C.D. Cal. Aug. 8, 2007) (citation omitted) (granting motion to vacate entry of  
 4 default where defendant stated he did not receive actual notice of the action until  
 5 after default was entered).

6 *Schwab v. Bullock’s Inc.*, 508 F.2d 353 (9th Cir. 1974) is directly on point.  
 7 There, the Ninth Circuit reversed a denial of a defendant’s motion under the more  
 8 stringent Rule 60(b) standard to vacate a default judgment. In that case, the plaintiff  
 9 “made one effort to serve the [] complaint personally on” the defendant. *Id.* at 354.  
 10 When that effort failed, further efforts to locate or serve the defendant personally  
 11 were abandoned and plaintiff instead purported to effect service through service on  
 12 the Secretary of State. *Id.* Notice was mailed to the defendant’s address on record  
 13 with the Secretary of State but was returned undelivered, as the company had  
 14 moved and not updated the Secretary’s records. *Id.* In moving to vacate the entry of  
 15 a default judgment, the defendant filed affidavits denying knowledge of the  
 16 pendency of the action. *Id.* The Ninth Circuit found that, even though the defendant  
 17 was “responsible for the fact that it did not have actual notice of the litigation  
 18 pending against it, because [it] failed to notify the Secretary of State about its  
 19 change of address[,]”, “this negligence cannot be deemed ‘inexcusable’ within the  
 20 meaning of Rule 60(b).” *Id.* at 356. The Court held that “substantial justice would  
 21 not be done” by entering a default judgment for an act that occurred “sixteen years  
 22 earlier, unconnected in any way with an attempt to evade judicial process.” *Id.*

23 As in *Schwab*, because Defendants did not have actual notice of the litigation  
 24 prior to the entry of default, the Court should find that they are not culpable.

### 25 **B. Defendants Have Meritorious Defenses**

26 Defendants burden here is “minimal.” *Mesle*, 615 F.3d at 1094. They must  
 27 only “allege[] sufficient facts to support the possibility of at least one meritorious  
 28 defense.” *Twin Rivers Eng’g*, 2016 WL 7479368, at \*4. “All that is necessary to

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1 satisfy the ‘meritorious defense’ requirement is to allege sufficient facts that, if true,  
 2 would constitute a defense.” *Mesle*, 615 F.3d at 1094. “[T]he question whether the  
 3 factual allegation is true” is not to be determined by this Court in deciding whether  
 4 to set aside the default judgment. *Id.* (quoting in part *TCI Group*, supra, 244 F.3d at  
 5 701). A defense is considered meritorious if “there is some possibility that the  
 6 outcome of the suit after a full trial will be contrary to the result achieved by the  
 7 default.” *Hawaii Carpenters’ Trust Funds v. Stone*, 794 F.2d 508, 513 (9th Cir.  
 8 2001).

9 Although Defendants have numerous meritorious defenses<sup>4</sup>, the first and  
 10 foremost defense that they will assert upon vacating of the default is lack of  
 11 personal jurisdiction over the Special Defendants and failure to state a cause of  
 12 action predicated upon lack of nexus between Defendants AliRaza Jivan, Alfia  
 13 Jivan and Liberty and the contract.<sup>5</sup> (Alfia Jivan Decl. ¶¶ 3, 4, 9, 16.) (AliRaza  
 14 Jivan Decl. ¶ 3.) (Gharakhani Dec. ¶¶ 14-23.)

15 A cursory review of the contract reveals that the contract is only between  
 16 Plaintiff and DCM. (ECF No. 1, Ex1.) Alfia Jivan’s only connection to the contract  
 17 is that she signed the contract on behalf of DCM in her capacity as its President.  
 18 The connection between Plaintiff and AliRaza Jivan and Liberty is even more  
 19 tenuous as they are nowhere named in the contract. Despite the apparent lack of  
 20 connection with the contract, Plaintiff has named each Defendant as a party to each  
 21 of its four claims. Accordingly, Defendants will file the appropriate motion to  
 22 dismiss Plaintiff’s claims. (Alfia Jivan Decl. ¶¶ 3, 4, 9, 16.) (AliRaza Jivan Decl.  
 23 ¶ 16.) (Gharakhani Dec. ¶¶ 15-23.)

24 \_\_\_\_\_  
 25 <sup>4</sup> Defendants set forth this argument as narrowly as possible solely to meet their burden under  
 26 Rule 55(c); Defendants do not here challenge service of process and expressly reserves the right  
 27 to assert that and other defenses at the appropriate time.

28 <sup>5</sup> As stated above, Special Defendants reserve the right to move for dismissal on numerous  
 grounds, including under Federal Rules of Civil Procedure 12(b)(2), 12(b)(5), and 12(b)(6), as  
 appropriate.



1 Additionally, the Economic Loss Rule precludes Plaintiff's Promissory Fraud  
 2 claim. Specifically, Plaintiff is attempting to covert a garden variety breach of  
 3 written contract case into a tort action by asserting a claim for promissory fraud  
 4 predicated upon the same set of facts as Plaintiff's contractual claims. As such, the  
 5 Economic Loss Rule precludes Plaintiff from raising these breach of contract  
 6 allegations as tort claims. (Gharakhani Dec. ¶¶ 16-23.)

7 Finally, DCM also has meritorious defenses against Plaintiff's claims on the  
 8 grounds that DCM performed all of its obligations under the terms of the contract  
 9 with Plaintiff, except those that were excused. Furthermore, the contract's terms,  
 10 including but not limited to the force majeure clause, as well as, DCM's rights of  
 11 rejection of the goods bars Plaintiff's claims in their entirety. Finally, Plaintiff  
 12 breached the terms of the contract by not performing pursuant to its terms and,  
 13 specifically, failing to produce the product as required by the contract. (Alfia Jivan  
 14 Decl. ¶ 16.) (AliRaza Jivan Decl. ¶ 16.) (Gharakhani Dec. ¶¶ 14-16.)

### 15 C. Setting Aside the Defaults Will Not Prejudice Plaintiff

16 Plaintiff will not suffer any prejudice if the Court sets aside the entry of  
 17 default. "[B]eing forced to litigate on the merits cannot be considered prejudicial  
 18 ...." *Twin Rivers Eng'g*, 2016 WL 7479368, at \*4 (citation omitted). Further,  
 19 prejudice requires "greater harm than simply delaying resolution of the case.  
 20 Rather, the standard is whether plaintiff's ability to pursue his claim will be  
 21 hindered." *Id.* Thus, the issue is "whether the delay caused by the default may  
 22 'result in tangible harm such as loss of evidence, increased difficulties of discovery,  
 23 or greater opportunity for fraud or collusion.'" *Alpert v. Screen Actors Guild, Inc.*,  
 24 No. CV 04-10059 SVW (CWx), 2005 WL 8154961, at \*3 (C.D. Cal. Feb. 9, 2005)  
 25 (citing *Thompson v. Am. Home Assurance Co.*, 95 F.3d 429, 433-34 (6th Cir.  
 26 1996)).

27 "There is no prejudice to the plaintiff where the setting aside of the default  
 28 has done no harm to plaintiff except to require it to prove its case." *Lacy v. Sitel*

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1 *Corp.*, 227 F3d 290, 293 (5th Cir. 2000) (internal quotes omitted).

2 Plaintiff obtained its defaults against Alfia Jivan, Liberty and DCM on June  
3 17, 2020 and the default against AliRaza Jivan approximately three weeks ago on  
4 July 21, 2020. Accordingly, there is no credible argument that setting aside the  
5 default creates any added risk of increased discovery difficulties or lost evidence.  
6 As in *Alpert*, the only effect on Plaintiff here, if the Court sets aside the defaults, is  
7 to require Plaintiff to litigate its case and prove it is entitled to the \$475,197.80,  
8 excluding attorneys fees and costs, that Plaintiff seeks in its Motion for Entry of  
9 Clerk's Default Judgment against DCM. (ECF No. 15.)

10 This is entirely consistent with the Court's "policy of favoring judgments on  
11 the merits[.]" *Mesle*, 615 F.3d at 1091 (citation omitted).

12 **VI. CONCLUSION**

13 For all of the above reasons, Defendants respectfully requests that this Court  
14 grant their Motion to Set Aside the Clerk's Entry of Default.

15  
16 Dated: August 13, 2020

ROSTOW & AUSTER LLP

17  
18 By: /s/ Reza I. Gharakhani

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21 DCM, INC., and ALIRAZA JIVAN and  
22 Specially appearing on behalf of  
23 Defendants LIBERTY NOVELTY, INC.,  
24 and ALFIA JIVAN  
25  
26  
27  
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